91-293

NO. _____

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

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SOUTHERN PACIFIC TRANSPORTATION CO., PETITIONER,

v.

JOSE HERNANDEZ, RESPONDENT

---

## ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court held it was reversible error to refuse to instruct the jury that damages awards were not subject to federal income taxation in an action controlled by federal common law. In this case the trial court refused to instruct the jury on the non-taxability of any award, and the appellate court held this error was harmless. The question presented for this Court's review, upon which the courts of appeal are in conflict, is the following:

Does the *Liepelt* rule apply in all cases controlled by federal common law, or is it only reversible error to refuse the non-taxability instruction where it appears in hindsight from the face of the verdict that the jury improperly inflated its award?

## LIST OF PARTIES

All parties who appeared in the Court of Appeals for the Fourth Supreme Judicial District of Texas are listed in the caption. The following entities are either subsidiaries (not wholly owned) or parent companies of Southern Pacific Transportation Co.:

- St. Louis Southwestern Railway Co.
- Sunset Railway Co.
- SPTC Holding, Inc.
- Rio Grande Industries, Inc.
- The Alton & Southern Ry. Co.
- Arkansas & Memphis Railway Bridge and Terminal Company
- Kansas City Terminal Railway Co.
- Southern Il. and Mo. Bridge Co.
- Terminal R.R. Assoc. of St. Louis
- Trailer Train Company
- Central California Traction Company
- The Ogden Union Ry. & Depot. Co.
- Portland Terminal Railroad Co.
- Portland Traction Company

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**

**Statutes:**



**Miscellaneous:**

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. _____

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SOUTHERN PACIFIC TRANSPORTATION CO., PETITIONER,

v.

JOSE HERNANDEZ, RESPONDENT

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## ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

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Petitioner, Southern Pacific Transportation Co. ("Southern Pacific"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourth Supreme Judicial District of Texas, entered in this proceeding on January 16, 1991.

## OPINION BELOW

The opinion of the court of appeals (App. A, infra, 1a) is reported at 804 S.W.2d 557. No opinion was issued by the state trial court. The Texas Supreme Court denied

Petitioner's application for writ of error without opinion on May 23, 1991. (App. B, infra, 14a)

## JURISDICTION

After timely appeal by Southern Pacific, the judgment of the state court of appeals was signed on January 9, 1991. Southern Pacific's timely motion for rehearing was denied by the court of appeals on March 6, 1991. (App. C, infra, 16a) The Texas Supreme Court denied Southern Pacific's timely application for writ of error on May 23, 1991. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257(a).

## STATUTE INVOLVED

This action was brought under the Federal Employer's Liability Act (FELA), 45 U.S.C.A. § 51 et seq. (App. E, infra, 19a) The proper measure of damages in an FELA action is a question of federal law. *Liepelt*, 444 U.S. at 493.

## STATEMENT

Jose Hernandez, the plaintiff in the trial court, sued Southern Pacific on the grounds that injuries he sustained in the course of employment were caused by Southern Pacific's negligence.

At the close of the evidence, Southern Pacific requested that the trial court give the jury the following instruction regarding the effect of income taxes on any recovery by the plaintiff:

> Under the law, any award made to the Plaintiff in this case is not subject to federal or

> state income tax. Therefore, in computing the amount of damages which you may find the Plaintiff is entitled to recover for past or future lost earnings, the Plaintiff is entitled to recover only the net, after-tax income. In other words, Plaintiff is entitled to recover only "take-home pay" which you find he has lost in the past, or will lose in the future.

The trial court refused the tendered instruction, which was drawn verbatim from Instruction No. 6B of the Fifth Circuit District Judges Association, Pattern Jury Instructions (Civil Cases) (1983), and Southern Pacific timely objected to the refusal. Southern Pacific timely raised this federal question on appeal in its Brief of Appellant, filed December 4, 1989, with the Court of Appeals for the Fourth Supreme Judicial District of Texas.

The court's charge to the jury contained no instruction concerning the non-taxable nature of any award to Hernandez. The jury found in favor of Hernandez, and after reducing the award by the 20% contributory negligence finding, and by the two liens held against Hernandez's recovery, the net value of Respondent's judgment against Southern Pacific is $422,295.47, plus costs of court and interest.

The Texas appellate court below acknowledged that *Liepelt* was controlling and that "it was erroneous for the trial court to fail to instruct on the non-taxability of the award." 804 S.W.2d at 561. The Court considered such error to be harmless, however, stating:

In *Liepelt*, the respondent's expert witness computed the amount of pecuniary loss at $302,000 plus the value of the care and training that the decedent would have provided to his young children. The jury, however, awarded damages of $775,000. . . .

. . . .

In the case at hand, Everitt Dillman, Ph.D., *Hernandez's own expert witness*, calculated Hernandez's lost *past* earnings to be $57,915. . . . Dillman computed Hernandez's lost *future* earnings at $998,242 to age 61, assuming 100% disability, and at $1,344,515 to age 70, also assuming 100% disability. Dillman also computed lost *future* earnings at between $350,000 and $400,000, assuming an impairment rating of 35–40% and retirement at 61. . . . Dillman also calculated lost *future* earnings of $600,000 based on Hernandez's last employment prior to his employment with Southern Pacific. . . . Dillman, moreover, testified that in his calculations *he had deducted income taxes* from Hernandez's past and future wage losses. . . .

We find that the trial court's failure to grant Southern Pacific's requested instruction on the non-taxability of Hernandez's award was harmless error on the grounds that the jury was aware that Hernandez's expert witness had already deducted income taxes in calculating Hernandez's lost past and future wages and the



jury's verdict indicates that the jury did not improperly inflate the recovery since it is far less than the highest values given by the expert witness and only slightly higher than the smallest value. *See Liepelt*, 444 U.S. at 497, 100 S. Ct. at 759; *Flanigan*, 632 F.2d at 890.

*Id.* at 561–62.

## REASONS FOR GRANTING THE PETITION

I.

*The Texas appellate court's opinion is contrary to this Court's decisions in Gulf Offshore Co. v. Mobil Oil Corp., and Liepelt v. Norfolk & W. Ry., and undermines a defendant's protection from inflated jury awards.*

In *Liepelt*, the administrator of a train fireman sued the railroad under the FELA for the death of the fireman. The defendant requested a cautionary instruction advising the jury of the non-taxability of any damages award. The trial court refused to give the instruction. The jury returned a verdict for the plaintiff of $775,000. 444 U.S. at 491.

This Court held that the failure to give the non-taxability instruction was reversible error,[1] stating:

> [I]t is entirely possible that the members of the jury may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated. . . .
>
> It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes, and that therefore it improperly inflated the recovery. Whether or not this speculation is accurate. . . .

---

[1]In *Liepelt* this Court also addressed the issue of whether it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings, and concluded exclusion of the evidence was error. 444 U.S. at 494. The issue is not relevant to this case. The appellate court below, however, confused the two issues in its holding. 804 S.W.2d at 562. The two issues are distinct, and the introduction of evidence regarding the plaintiff's after-tax earnings does not affect a defendant's entitlement to the non-taxability of award instruction. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981); see generally, Note, *"Income Taxation and the Calculation of Tort Damage Awards: The Ramifications of Norfolk & Western Railway v. Liepelt,"* 38 Wash. & Lee L. Rev. 289, 290-91 (1981). Southern Pacific was entitled to a proper instruction from the trial court regarding the non-taxable nature of any award to Hernandez. Dr. Dillman never told the jury that Hernandez would not pay taxes on the award in this case. In any event, such a statement from an interested expert witness would not discharge the trial court's responsibility to properly instruct the jury.

> We hold that it was error to refuse the requested instruction in this case.

444 U.S. at 496–98.

The facts of *Liepelt* and its rationale make clear that the court below erred and that reversible error occurs whenever a trial court refuses to instruct on the non-taxability of an award. A defendant is entitled to the instruction whether or not it is successful in making an after-the-fact showing that the jury actually inflated the size of its award because of imaginary taxes.

In *Liepelt* there was a significant discrepancy between the damages estimate provided by the plaintiff's expert witness ($302,000) and the damages awarded by the jury ($775,000). *Id.* at 497. The size of this discrepancy was critical to the court below and to the federal appellate courts supporting a restrictive reading of *Liepelt*. *Southern Pacific Transp. Co. v. Hernandez*, 804 S.W.2d at 562; *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 890 (8th Cir. 1980), cert. denied, 450 U.S. 921 (1981).

An examination of the lower appellate court opinion in *Liepelt*, however, reveals that the size of the discrepancy between the plaintiff's economist's estimate of damages and the jury's actual award does not control whether the non-taxability instruction is required. See also, *O'Byrne v. St. Louis S.W. Ry.*, 632 F.2d 1285, 1287 (5th Cir. 1980) (per curiam). Damage elements awarded by the trial court in *Liepelt* included non-economic factors that could not be quantified: "[t]he economist was unable to value the elements of rearing, training, instruction, advice and guidance of the decedent's children. He knew of no statistics for placing a

monetary value upon these elements." *Liepelt v. Norfolk & W. Ry.*, 378 N.E.2d 1232, 1245 (Ill. App. Ct. 1978). Surely, it would not have been "fanciful" for the *Liepelt* jury to place a larger value on these non-pecuniary damage elements than the pecuniary elements subject to the economist's calculations. Accordingly, it is not at all clear that the *Liepelt* jury inflated its award, and such speculation cannot explain this Court's decision. 444 U.S. at 497-98 ("[w]hether or not this speculation is accurate . . . [w]e hold it was error to refuse the requested instruction . . . .").

Both the majority and the dissenting opinions in *Liepelt* recognized it was impossible to determine whether the jury actually inflated the award because of a mistaken understanding of the Internal Revenue Code. 444 U.S. at 497-98, 503 (Blackmun, J., dissenting). It is likewise not possible in this case to divine what influenced the jury's determination of the size of the award and whether improper consideration of imaginary taxes played a role. There is no evidentiary or logical basis for the appellate court's conclusion that "the jury's verdict indicates that the jury did not improperly inflate the recovery...." 804 S.W.2d at 562. Contrary to the court of appeals reasoning, there is no meaningful distinction between the facts in *Liepelt* and the facts here. The apparent lack of discrepancy in this case between the economist's testimony and the jury's award does not indicate the recovery was not improperly inflated. The jury in this case was entitled to place a far lower value on plaintiff's economic damages than the values assumed by his expert witness, e.g., *Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284, 1288 (3rd Cir.), cert. denied, 444 U.S. 917 (1979); *United States v. Jackson*, 425 F.2d 574, 577 (D.C. Cir. 1970).

In fact, Dr. Dillman completed no individual assessment of the value of the plaintiff's lost earning capacity, but simply made calculations based on various assumptions. 804 S.W.2d at 562. Accordingly, the appellate court's conclusion that there was no discrepancy between the testimony on damages and the jury's award erroneously assumed that the economist rather than the jury would decide Hernandez's degree of impairment.[2] In view of this testimony, it is entirely possible that the jury concluded Hernandez's impairment was far less than what the economist assumed and mistakenly factored imaginary taxes into its award to arrive at the aggregate damages finding of $555,520.14.[3] This testimony and the general proposition that "few members of the public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code," 444 U.S. at 497 [citation omitted], shows Southern Pacific was harmed by the trial court's refusal to give the non-taxability of award instruction.

Following *Liepelt*, the Fifth Circuit Court of Appeals directly addressed the issue of whether the size of the gap between the economist's damages estimate and the jury award (the amount of assumed improper jury inflation) was relevant to a finding of reversible error. The court concluded it was not, and reversed the judgment because of the failure to give the non-taxability instruction. *O'Byrne*, 632 F.2d at 1287.

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[2]The appellate court also got the facts wrong. Contrary to the court's conclusion that "Southern Pacific's expert witness [found] that Hernandez had an impairment rating of 35%-40%," *id.*, Dr. Carlos Arazosa was in fact Plaintiff's treating physician.

[3]After Plaintiff's contributory negligence of 20% and various liens were reduced from this gross amount, the net judgment against Southern Pacific is $422,295.47.

See also *In re Air Crash Disaster Near Chicago*, 803 F.2d 304, 313, 317–18 (7th Cir. 1986) (finding reversible error in denial of instruction notwithstanding conclusion that jury award was not excessive); *Fulton v. St. Louis–S.F. Ry.*, 675 F.2d 1130, 1134 (10th Cir. 1982) (finding reversible error in denial of instruction without any discussion of a discrepancy between the jury's award and the evidence on damages).

*Liepelt* was further clarified in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). *Gulf Offshore* was a personal injury action under the Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1331 et seq. On appeal to the United States Supreme Court, one of the defendants claimed it was entitled to a jury instruction under federal law that personal injury damage awards were not subject to federal taxation.

Although the Court remanded the case to state court for a determination of Louisiana law, it accepted the argument that the defendant was entitled to a non–taxability of award instruction, even in the absence of evidence showing the effect of taxation:

> We also reject respondents' contention that we are foreclosed from deciding the issue because petitioner did not introduce any evidence about the effect of taxation on Gaedecke's future earnings. No evidentiary predicate is required to instruct a jury *not* to consider taxes.... [W]e held in *Liepelt* . . . that a defendant in an FELA case is entitled to an instruction that damages awards are not subject to federal income taxation . . . . [T]he instruction furthers strong federal policies of fairness and

> efficiency in litigation of federal claims. If Congress had been silent about the source of law in an OCSLA personal injury case, *Liepelt* would require that the instruction be given.

453 U.S. at 485 n.15, 486–87. The court of appeals' opinion in this case did not address the *Gulf Offshore* decision.

*Liepelt*'s rationale, as well as this Court's subsequent decision in *Gulf Offshore*, compel the conclusion that reversible error occurs whenever a trial court refuses the non-taxability instruction. In effect, *Liepelt* and *Gulf Offshore* establish a *per se* rule that reversible error occurs whenever a trial court refuses to instruct the jury that damages awards are non-taxable. Any rule other than a requirement that the instruction be given in all cases will lead appellate courts to speculate about the jury's collective mental process in arriving at a particular figure.[4] The *per se* rule is superior in ease of application and in insuring that defendants are not subject to improperly inflated damages awards. Such a rule was explicitly adopted by the Fifth Circuit in *O'Byrne* and implicitly endorsed by the Seventh Circuit in *Air Crash Disaster* and by the Tenth Circuit in *Fulton*. In contrast, only the Eighth Circuit supports the harmless error rule adopted in this case.

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[4]As a general rule, Fed. R. Ev. 606(b) prohibits post-verdict inquiry into the jury's deliberations. In other contexts this Court has recognized the strong policy considerations against making such inquiries. E.g., *Tanner v. United States*, 483 U.S. 107 (1987). Accordingly, courts should not be encouraged to speculate about the possible influences on a jury's deliberations to impeach a verdict.

Under the Texas court of appeals' reasoning, as well as the reasoning in *Flanigan*, a defendant will be entitled to reversal on appeal for refusal of the non-taxability instruction only where the actual jury award was larger than the highest damage estimates supplied by plaintiff's expert witness. See *Hernandez*, 804 S.W.2d at 562. In all other cases, failure to give the non-taxability instruction would be harmless error even if the award had been improperly inflated by the jury.

Unless this Court corrects the error committed by the court below, defendants in actions decided under federal common law will face anew the dangers of inflated jury awards which this Court attempted to minimize in *Liepelt*. See 444 U.S. at 496-97.

This Court should re-affirm its holding in *Liepelt* for the same reasons *Liepelt* was originally decided:

> "[t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus over-compensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable."

Id. at 498 (alteration in original) (quoting *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 297 (9th Cir. 1975)).

II.

*The Texas appellate court's holding that failure to instruct the jury regarding the non-taxability of a personal injury damage award was harmless error addresses an issue of national significance upon which the United States Courts of Appeals are in conflict.*

In *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court decided that a defendant in an FELA case was entitled to a cautionary jury instruction that damage awards were not subject to income taxation and that taxes should not be considered by the jury in reaching its verdict. *Id.* at 498.

Since the FELA afforded no guidance on the issue, the court articulated a federal common-law rule of general applicability. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486-87 & n. 17 (1981). Accordingly, the issue presented by this Petition has significance far beyond the FELA and the immediate parties to this litigation, and transcends the "academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

*Liepelt* has been followed by numerous courts in resolving a variety of federal claims. The non-taxability instruction is required in actions brought under the Jones Act, e.g., *Nesmith v. Texaco, Inc.*, 491 F. Supp. 561, 563 (W.D. La. 1980), modified in part per curiam on other grounds, 727 F.2d 497 (5th Cir. 1984), cert. denied, 469 U.S. 855 (1984); in actions brought under the Death on the High Seas Act, e.g. *Solomon v. Warren*, 540 F.2d 777, 788 n.12 (5th Cir. 1976), cert. dismissed sub nom. *Warren v. Serody*, 434 U.S. 801 (1977); *National Airlines, Inc. v. Stiles*, 268 F.2d 400, 403-04

n.4 (5th Cir.), cert. denied, 361 U.S. 885 (1959); and is arguably required in actions brought under 42 U.S.C.A. § 1983 unless the award only involves back pay, which is considered taxable. See generally, Note, *"Income Taxation and the Calculation of Tort Damage Awards: The Ramifications of Norfolk & Western Railway v. Liepelt,"* 38 Wash & Lee L. Rev. 289, 301 (1981).[5]

The appellate court below acknowledged a conflict in the federal circuits with regard to the question of whether a defendant is automatically entitled to a non-taxability of award instruction. Rather than following controlling precedent from the Fifth Circuit Court of Appeals, however, the Texas court followed authority from the Eighth Circuit Court of Appeals because it deemed this authority "more persuasive." 804 S.W.2d at 561, comparing *O'Byrne v. St. Louis S.W. Ry.*, 632 F.2d 1285, 1287 (5th Cir. 1980) ("*Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested [non-taxability of award] instruction") and *Lang v.*

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[5]A survey of reported decisions relating to these statutes provides some indication of the significance of the issue presented here. A WESTLAW search for calendar year 1990 revealed 246 state and federal cases which referred to the FELA; 132 cases which referred to the Jones Act; 26 cases which referred to the Death on the High Seas Act, and 4,648 cases which referred to 42 U.S.C.A. § 1983. Official statistics published by the Administrative Office of the United States Courts reflect that in the twelve-month period between June 30, 1989, and June 30, 1990, 2,741 FELA cases were commenced in the federal district courts, as well as 2,961 marine personal injury actions, and almost 45,000 actions claiming federal civil rights violations. 1990 Annual Report of the Director of the Administrative Office of the United States Courts (Appendix 1 at pp. 32-33). Petitioner obviously has not reviewed these cases, and only suggests that this raw data provides some indication of the significance of the issue raised.

*Texas & P. Ry.*, 624 F.2d 1275, 1280 (5th Cir. 1980) (applying *Liepelt* retroactively in holding that failure to give instruction was reversible error) with *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 890 (8th Cir. 1980), cert denied, 450 U.S. 921 (1981) (defendant must show evidence that jury in fact operated under false impression of tax laws for failure to give instruction to constitute reversible error).

In rejecting the rule in the Fifth Circuit, the court below also failed to acknowledge *In re Air Crash Disaster Near Chicago*, 803 F.2d 304, 313 (7th Cir. 1986), which relied on *Liepelt* and *Gulf Offshore* in ruling that the non-taxability instruction was required "as a matter of generally applicable federal common law." In *Fulton v. St. Louis-S.F. Ry.*, 675 F.2d 1130, 1134 (10th Cir. 1982), the Tenth Circuit Court of Appeals also followed *Liepelt* and reversed a jury's verdict in an FELA case for failure of the trial court to instruct on the non-taxability issue.

A conflict between the federal courts of appeal on an issue of federal law is an important reason for this Court to grant a petition for writ of certiorari. E.g., *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 700 (1982); *Marks v. United States*, 430 U.S. 188, 189 (1977). The conflict presented in this case is more than the garden variety inter-circuit dispute, however. If left undisturbed, the Texas appellate court's decision will create a conflict of law between federal district courts sitting in Texas and Texas state courts. Such inter-system conflicts strike at the heart of the *Erie* doctrine. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956) ("The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a state court a block away should not lead to a substantially

different result.") (citation omitted). See also, Hill, *Substance and Procedure in State FELA Actions--The Converse of the Erie Problem?*, 17 Ohio St. L.J. 384, 386-87 (1956).

In addition to these jurisprudential concerns, the conflict in issue undermines the goal of uniformity in the interpretation or federal law, which is particularly applicable to the FELA since the state and federal courts have concurrent jurisdiction. This Court recognized in *Liepelt* that one purpose of the FELA was "to create uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees." 444 U.S. at 493 n.5 (citation omitted). See also, *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 298-99 (1949) (uniformity in adjudication of federally created rights is desirable).

## CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict between the courts of appeal, and to preserve the right of defendants in cases governed by federal law to be free from inflated jury awards based upon speculation that such awards may be taxable.

Respectfully submitted,

HOWARD P. NEWTON
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ROBERT SHAW-MEADOW
*Counsel for Petitioner*

August 1991

# APPENDIX

## APPENDIX A

## COURT OF APPEALS
## FOURTH COURT OF APPEALS
## DISTRICT OF TEXAS
## SAN ANTONIO
## JUDGMENT

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Appeal No. 04-89-00554-CV

---

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellant,
versus
JOSE HERNANDEZ,
Appellee.

## OPINION

Appeal from the 293rd District Court of Maverick County
Trial Court No. 8758
Honorable Rey Perez, Judge Presiding

Opinion by: Ron Carr, Justice

Sitting: Shirley W. Butts, Justice
Alfonso Chapa, Justice
Ron Carr, Justice

Delivered and Filed: January 16, 1991

AFFIRMED

This is an appeal from a judgment rendered after an adverse jury verdict in a suit brought pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51–60 (1986). Appellee, Jose Hernandez, filed suit against Southern Pacific Transportation Company (Southern Pacific), alleging that while employed by Southern Pacific, he sustained injuries and incurred damages caused by Southern Pacific's negligence. The court entered a judgment in favor of Hernandez in the amount of $444,416.11 plus post–judgment interest and costs of court.

This appeal presents us with the following issues: (1) whether Southern Pacific is entitled to a new trial because it could not secure a complete and proper record of the trial; (2) whether the court's refusal to include a jury instruction on the non–taxability of the award amounted to reversible error; (3) whether there is no evidence that Hernandez was injured while employed in interstate commerce; (4) whether the trial court committed reversible error by refusing to give the jury Southern Pacific's requested instruction regarding mitigation of damages; and (5) whether the trial court erred in reducing Hernandez's award by the 20% contributory negligence finding. We affirm.

In the first point of error, Southern Pacific argues that it is entitled to a new trial because a complete and proper record of the trial cannot be secured. Under this point of error, Southern Pacific argues that two significant parts of the record are missing: (1) an expert witness's deposition testimony which was read into the record but not included in the statement of facts, and (2) the *original* "Defendant's Requested Questions and Instructions."

Southern Pacific asserts in its brief, and Hernandez does not dispute, that on the morning of May 24, 1989, the official court reporter, Jerry Parmer, was absent for the commencement of testimony. In Parmer's absence, the presiding judge, the Honorable Rey Perez, requested and authorized Lisa Edwards, a deputy reporter, to make a full record of the evidence. Rule 11 of the Texas Rules of Appellate Procedure provides that the presiding judge of the court may authorize a deputy reporter to act in place and perform the duties of the official reporter. TEX. R. APP. P. 11(c). Those duties include making a full record of the evidence when requested by the judge or any party to a case. TEX. R. APP. P. 11(a).

Deputy Reporter Edwards proceeded to record the oral testimony and evidence on May 24 and 25, 1989. A. R. Nering, M.D., who examined Hernandez, testified by deposition regarding Hernandez's physical condition at the time of the examination and the prognosis for recovery.

In Volume III[1] of the statement of facts, which was prepared and certified by Edwards, the part concerning Dr. Nering's testimony reads as follows:

> Mr. Figueroa: Your Honor, at this time, we would call A. R. Nearing, M.D. [sic], by deposition. For the record, Your Honor, Dr. Nearing's [sic] deposition was taken on

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[1]The labeling of this volume as "Volume III" is a misnomer. The official court reporter, Jerry D. Parmer, had transcribed testimony into three volumes which he labeled Volume 1, Volume 2, and Volume 3. Edward's volume, therefore, is actually the fourth volume of the statement of facts.

> Tuesday, March 15, 1988, at 2:00 p.m. at his office in El Paso.
>
> A. R. Nearing, M.D., [sic] sworn by the court reporter testified as follows: and these are questions by Howard Newton, my partner. Beginning on page 2, line 19:
>
> > (Whereupon, Mr. Figueroa and Mr. Walker read the oral deposition of A. R. Nearing, M.D. [sic])
>
> Mr. Figueroa: That concludes our offer of this deposition, your Honor.

In its brief, Southern Pacific's attorney contends that he first learned of the omission of Dr. Nering's deposition testimony from the statement of facts when reading the volume prepared by Edwards; that he contacted Hoffman Reporting Service, for whom Edwards worked, but learned that Edwards had moved to Italy and was no longer with that reporting service; and that Hoffman Reporting Service also informed him that they could not locate any recording made by Edwards which was not already transcribed in the volume of the statement of facts Edwards prepared.

On appeal, Southern Pacific filed a "Motion for Amendment of the Record" pursuant to Rule 55 of the Texas Rules of Appellate Procedure. That rule provides for different methods to correct inaccuracies in the transcript or statement of facts. TEX. R. APP. P. 55. This court granted Southern Pacific's "Motion for Amendment of the Record" and added "Exhibit D-3," the oral deposition of A. R.

Nering, M.D., to the formal record of this case. Appellee Hernandez, moreover, did not disagree to the addition of the deposition to the record.

The entire deposition of Dr. Nering, which had been read at trial but not included in the statement of facts, is now part of the formal record before this court. A new trial record has not been created; the appellate record has simply been corrected. *See Gerdes v. Marion State Bank*, 774 S.W.2d 63, 65 (Tex. App.--San Antonio 1989, writ denied) ("Rule 55 authorizes trial judges and appellate courts to correct the *appellate* record on their own initiative, or at the request of counsel; it does not allow the creation of a new trial court record."). We find, therefore, that the record before us is complete and that this complaint under point of error one is moot.

Southern Pacific also contends under this point of error that since the original "Defendant's Requested Questions and Instructions" is not part of the record, the record on appeal is incomplete, and therefore, Southern Pacific is unable, through no fault of its own, to show that error was properly preserved.

In its brief Southern Pacific asserts, and the record supports, that a file-stamped copy of "Defendant's Requested Questions and Instructions" appears in the transcript on appeal. In October 1989, Diamantina Trevino, District Clerk of Maverick County, contacted Southern Pacific and informed Southern Pacific that its requested questions and instructions were not in the court's files. The clerk then requested Southern Pacific's counsel to provide a copy of the part of the transcript entitled "Defendant's Requested Questions and Instructions" to serve as a substitute for the record. Southern

Pacific's counsel responded by providing copies of the issues and instructions, and these were file-stamped and substituted into the record by District Clerk Trevino.

Southern Pacific and Hernandez have stipulated that requested instruction 19 (which is made the basis of point of error 2) and requested instruction 20 (which is made the basis of point of error 4) were both submitted to the trial court in the same form as they appear in the transcript. Both parties stipulate, moreover, that the trial judge refused instructions 19 and 20 and endorsed each of those instructions with his signature and the word "refused." The stipulation is supported by the statement of facts, which reflects that the judge refused requested instructions 19 and 20.

Rule 50(e) of the Texas Rules of Appellate Procedure provides that "[w]hen the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases." TEX. R. APP. P. 50(e). In the case at bar, there has been a proper substitution, and Hernandez does not challenge the substitution on appeal. We find, therefore, that Southern Pacific has failed to show how it is harmed by not having the original. TEX. R. APP. P. 81(b).

Southern Pacific's first point of error is overruled.

In the second point of error, Southern Pacific argues that the court's refusal to include a jury instruction on the non-taxability of an award amounted to reversible error.

The leading case regarding this issue is *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62

L. Ed. 2d 689 (1980). In *Liepelt*, the administrator of the estate of a freight train fireman brought an action to recover against the railroad under FELA for the death of the fireman. The case was originally heard in an Illinois state court but ultimately was appealed to the U.S. Supreme Court. The Supreme Court found that it was error for the trial court to have refused the requested instruction regarding the non-taxability of the award. In *Liepelt*, the respondent's expert witness computed the amount of pecuniary loss at $302,000 plus the value of the care and training that the decedent would have provided to his young children. The jury, however, awarded damages of $775,000. The Supreme Court found that "[i]t is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes, and that therefore it improperly inflated the recovery." 444 U.S. at 497, 100 S. Ct. at 759. The Court reversed the judgment and remanded the case for further proceedings not inconsistent with its opinion.

We follow *Liepelt* and find that it was erroneous for the trial court to fail to instruct on the non-taxability of the award. 444 U.S. at 498, 100 S. Ct. at 759; *see also Flanigan vs. Burlington Northern Inc.*, 632 F.2d 880, 889 (8th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S. Ct. 1370, 67 L. Ed. 2d 349 (1981). Our inquiry, however, does not end here. *See Flanigan*, 632 F.2d at 889.

Appellant relies on two Fifth Circuit cases, *O'Byrne v. St. Louis Southwestern Ry. Co.*, 632 F.2d 1285 (5th Cir. 1980), and *Lang v. Texas & Pacific Ry. Co*, 624 F.2d 1275 (5th Cir. 1980), to argue that *Liepelt* requires an automatic finding of reversible error if a requested jury instruction regarding taxability of an award is refused by the trial court.

In *O'Byrne*, the Fifth Circuit found unpersuasive the argument that the failure to give the requested instruction was harmless error. 632 F.2d at 1286. In *Lang*, the Fifth Circuit, citing *Liepelt*, found that the trial court had erred by refusing to give the proffered charge concerning taxability. 624 F.2d at 1280. We, however, do not find these Fifth Circuit cases persuasive.

We find *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 889 (8th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S. Ct. 1370, 67 L. Ed. 2d 349 (1981), more persuasive than *Lang* and *O'Byrne*. In *Flanigan*, the Eighth Circuit, in an opinion whose writ for certiorari was denied by the U.S. Supreme Court, held that *Liepelt* did not require automatic reversal if a jury instruction regarding non-taxability of the award was denied. The *Flanigan* court applied a harmless error test. 632 F.2d at 889. In Texas, morever,

> [n]o judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case. . . .

TEX. R. APP. P. 81(b)(1). We find that the trial court's failure to include Southern Pacific's requested instruction on the nontaxability of Hernandez's award did not cause the rendition of an improper verdict for the reasons provided below.

In the case at hand, Everitt Dillman, Ph.D., *Hernandez's own expert witness*, calculated Hernandez's lost *past* earnings to be $57,915. To calculate Hernandez lost *future* earnings, Dillman used several methods. Dillman computed Hernandez's lost *future* earnings at $998,242 to age 61, assuming 100% disability, and at $1,344,515 to age 70, also assuming 100% disability. Dillman also computed lost *future* earnings at between $350,000 and $400,000 assuming an impairment rating of 35–40% and retirement at 61. This last calculation was based on the finding of Dr. Carlos Arazosa, Southern Pacific's expert witness, that Hernandez had an impairment rating of 35–40%. Dillman also calculated lost *future* earnings of $600,000 based on Hernandez's last employment prior to his employment with Southern Pacific, which was as a clerk earning $6.00 per hour. Dillman, moreover, testified that in his calculations *he had deducted income taxes* from Hernandez's past and future wage losses. The court entered judgment in favor of Hernandez in the amount of $444,416.11 plus post-judgment interest and costs of court.

We find that the trial court's failure to grant Southern Pacific's requested instruction on the non-taxability of Hernandez's award was harmless error on the grounds that the jury was aware that Hernandez's expert witness had already deducted income taxes in calculating Hernandez's lost past and future wages and the jury's verdict indicates that the jury did not improperly inflate the recovery since it is far less than the highest values given by the expert witness and only slightly higher than the smallest value. *See Liepelt*, 444 U.S. at 497, 100 S. Ct. at 759; *Flanigan*, 632 F.2d at 890.

Southern Pacific's second point of error is overruled.

In the third point of error, Southern Pacific argues that the trial court erred in entering judgment against it because there was no evidence that Hernandez was injured while employed in interstate commerce as required by FELA:

> Every common carrier by railroad while engaging in commerce between . . . any of the States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 51 (1986).

In addressing a no evidence point, the court considers only the evidence and inferences tending to support the

finding and disregards all evidence and inferences to the contrary. *Sherman v. First Nat'l Bank*, 760 S.W.2d 240, 242 (Tex. 1988). In the case at hand, we must determine whether there is some evidence to support the jury's finding that Hernandez was injured while employed in interstate commerce. *Id.* After reviewing the entire record, we find that there is some evidence to support the jury's finding that Hernandez was injured while employed in interstate commerce.

In a request for admissions, Southern Pacific admitted that it is a railroad; that it was engaged in interstate commerce on the date of the injury; and that Hernandez was in the course and scope of his employment for Southern Pacific at the time of his injury. We find that Southern Pacific's admissions conclusively show that Southern Pacific's argument is without merit. Southern Pacific's third point of error is overruled.

In the fourth point of error, Southern Pacific argues that the trial court erred in refusing to give the jury Southern Pacific's requested instruction regarding mitigation of damages.

Federal law generally governs the substantive rights of the parties in FELA cases, but when such cases are filed in state courts, they are tried in accordance with the state's own applicable rules of civil procedure. *Dutton v. Southern Pacific Transp.*, 576 S.W.2d 782, 783–84 (Tex. 1978). In Texas, a court has considerable discretion to submit issues to a jury, and absent a showing of the denial of the rights of appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, there is no abuse of discretion by the trial judge. *Green Tree*

*Acceptance, Inc. v. Combs*, 745 S.W.2d 87, 89 (Tex. App.--San Antonio 1988, writ denied); TEX. R. CIV. P. 273.

In *Atchison, Topeka & Santa Fe Ry. Co. v. O'Merry*, 727 S.W.2d 596, 600-01 (Tex. App.--Houston [1st Dist.] 1987, no writ), a FELA case, the court evaluated a requested instruction identical to the one Southern Pacific requested here:

> In connection with Question Nos. ____ and ____, you are instructed that an injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury by taking reasonable steps to assist in effecting a healing of his injury and by resuming gainful employment as soon as such can reasonably be done. And if he fails to take reasonable steps to assist in effecting a healing of his injury so as to enable him to return to work, or if he does not resume and continue available employment even though he is physically able to do so, such person may not recover damages incurred after the date on which he was or reasonably could have been able to return to some form of gainful employment.

*See O'Merry*, 727 S.W.2d at 600. The court in *O'Merry*, in expressly rejecting the use of the identical requested instruction, ruled that "[t]he trial court must give definitions of legal and other technical terms, but is not required to give other instructions if they do not aid the jury." 727 S.W.2d at 601. It further held that since the specific instruction would not have been helpful to the jury, the trial court did not abuse

its discretion in refusing to submit the requested instruction. *Id.*

Applying *O'Merry*, we hold that the trial court in this case did not abuse its discretion in refusing to submit the requested instruction on mitigation of damages. Southern Pacific, moreover, has failed to show that it was harmed by the refusal to include the instruction.

The fourth point of error is overruled.

In a sole cross point, appellee Hernandez argues that if he failed to prove the interstate commerce activity which would bring this case within FELA, the trial court erred in reducing his award by the 20% contributory negligence finding. Section 3 of FELA provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . ." 45 U.S.C. § 53 (1986). We find, however, that Hernandez did prove the interstate commerce activity which would bring this case properly within FELA. The court, therefore, did not err in reducing Hernandez's award by 20% since the jury found that 20% of the negligence was attributable to Hernandez. The cross point is overruled.

The judgment is AFFIRMED.

RON CARR
Justice

PUBLISH.

## APPENDIX B

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 23, 1991

Mr. Howard P. Newton
Matthews & Branscomb
800 One Alamo Center
106 S. St. Mary's Street
San Antonio, TX 78205

Mr. Leo D. Figueroa
Matthews & Branscomb
800 One Alamo Center
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One Alamo Center, Suite 800
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San Antonio, TX 78205

Mr. John A. Carwile
Steinburg & Bryant
1301 McKinney, Suite 3600
Houston, TX 77010-3090



RE: Case No. D-1003

Style: SOUTHERN PACIFIC TRANSPORTATION COMPANY v. JOSE HERNANDEZ

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk

by:_____
Courtland Crocker, Deputy

# APPENDIX C

OFFICIAL NOTICE
COURT OF APPEALS
4th COURT OF APPEALS DISTRICT

*March 6, 1991*

*RE: Case No. 04-89-00554-CV*

*Style: Southern Pacific Transportation Co.*
*v. Jose Hernandez*

*After examination of the record in the above styled and numbered cause the Court DENIES Appellant's Motion for Rehearing.*

*ORDERED the day and year first above written.*

*Trial Court Case No. 8758* *HERB SCHAEFER, CLERK*

## APPENDIX D

## COURT OF APPEALS
## FOURTH COURT OF APPEALS
## DISTRICT OF TEXAS
## SAN ANTONIO
## JUDGMENT

---

Appeal No. 04-89-00554-CV

---

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Appellant,
v.
JOSE HERNANDEZ,
Appellee

Appeal from the 293rd District Court of Maverick County
Trial Court No. 8758
Honorable Rey Perez, Judge Presiding

BEFORE JUSTICES BUTTS, CHAPA, AND CARR

### J U D G M E N T

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED. It is ORDERED that appellee Jose Hernandez recover his costs of this appeal and the full amount of the trial court's judgment from appellant Southern Pacific Transportation Company, from National Surety Corporation as surety on appellant's cost

bond, and from Continental Casualty Company as surety on appellant's supersedeas bond.

SIGNED January 9, 1991.

RON CARR
JUSTICE

# APPENDIX E

## § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely

and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

NO. 91-293

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

---

SOUTHERN PACIFIC TRANSPORTATION CO., PETITIONER

v.

JOSE HERNANDEZ, RESPONDENT

---

## ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

---

## RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

---

RODNEY V. STEINBURG
JOHN A. CARWILE
*Counsel for Respondent*

Steinburg & Bryant
1301 McKinney, Suite 3600
Houston, Texas 77010-3090
(713) 654-7800

## QUESTION PRESENTED

In *Norfolk and W. Ry v. Liepelt*, 444 U.S. 490 (1980), this Court held it was error to refuse to instruct the jury in an F.E.L.A. case that damage awards were not subject to federal income taxation. In this case the trial court refused to instruct the jury on the non-taxability of the award. The appellate court found the refusal to be error, but applied a harmless error test to determine whether the case should be remanded for a new trial. Finding that the error was harmless, the appellate court affirmed. The real question presented for this Court's review is the following:

Is the *Liepelt* instruction subject to a harmless error standard of review, as all other jury instructions are, or will an exception to the harmless error rule be created for *Liepelt* instructions?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**

**Statutes**:



**Other Authorities**:

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

NO. 91-293

---

SOUTHERN PACIFIC TRANSPORTATION CO., PETITIONER

v.

JOSE HERNANDEZ, RESPONDENT

---

## ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

---

Respondent, Jose Hernandez, respectfully prays that a writ of certiorari be denied.

## STATEMENT OF THE CASE

This was a suit for damages for personal injuries sustained in an on the job accident. The suit was filed and tried pursuant to the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60.

Hernandez called Everitt Dillman, Ph.D., to testify regarding the economic losses sustained by Hernandez.

During his testimony as an expert in economics, Dr. Dillman addressed the fringe benefit issue. He testified that Hernandez had received fringe benefits from the Petitioner. He estimated those benefits to be equal to 42.8% of Hernandez's salary, even though a figure of 26% was used for his computations. Hernandez's loss of fringe benefits was included in Dr. Dillman's analysis of Hernandez's loss of earning capacity.

When asked about Hernandez's after-tax income, and his take-home pay, Dr. Dillman testified that Hernandez's after-tax income for 1986 was his gross earnings of $32,347, minus his income tax of $3,162, for a net, after-tax income of $28,245. Dr. Dillman was then asked, by Petitioner's counsel, a number of questions regarding Petitioner's records that showed a "take-home pay" of only $20,263. Dr. Dillman
stated that he did not know what deductions were from Hernandez's salary but he indicated that he had no arguments with that figure.

Petitioner then requested an instruction that would have deprived Hernandez of his fringe benefit claim, and would have equated after-tax income and "take-home pay", even though the evidence indicated that these figures were not the same.

Dr. Dillman estimated the past lost earnings to be $58,000 and the future loss of earning capacity, assuming 100% disability, to be $1,344,515. Since Dr. Carlos Arazoza had given Hernandez an impairment rating of 35 to 40%, Dr. Dillman used those figures and computed a future loss of earning capacity of $350,000 to $400,000. Since Hernandez's last employment prior to the Railroad was as a clerk earning $6.00 per hour Dr. Dillman used that figure and computed a future loss of earning capacity of $600,000.

The jury found that the past lost wages were $48,520.14 and that the future lost wages were $400,000.00.

Dr. Dillman testified that he deducted income taxes from Hernandez past and future wage losses and his report, which also indicated that income taxes were deducted, was admitted into evidence as Plaintiff's Exhibit 10.

Petitioner had requested an instruction regarding the non-taxability of the jury's award for the past and future wage losses. This instruction was refused and Petitioner has been unable to show that it was harmed by the refusal. In fact, Petitioner has conceded in previous briefs that it cannot show harm. In light of Dr. Dillman's testimony that income taxes had already been deducted from his figures, and in light of the fact that the jury's total award was $744,000 less than Dr. Dillman's highest figure, it is clear that Petitioner was not harmed by the refusal.

## REASONS FOR DENYING THE WRIT

I. *The requested tax instruction was properly refused as it was an incorrect statement of the law and was impossible to apply to the facts of this case.*

II. *The application of a harmless error rule is consistent with the decisions of this Court.*

III. *The application of a harmless error rule is consistent with the decisions of the Second, Third, Eight and Ninth Circuits.*

## SUMMARY OF THE ARGUMENT

In *Norfolk & Western Ry Co. v. Liepelt*, 444 U.S. 490 (1980) this Court determined that a defendant was entitled to a jury instruction regarding the non-taxability of the damage award. The issue now before this Court is whether a trial court's refusal to give the non-taxability instruction will be reviewed in accordance with a harmless error rule such as Rule 81, Texas Rules of Appellate Procedure. The appellate court correctly held that a harmless error rule should be used. In light of the fact that Petitioner has failed to show any harm (and has admitted in previous briefs that it cannot show harm), Petitioner argues that the a harmless error rule should not be used, claiming that the Rule is contrary to this Courts precedents and two Fifth Circuit cases.

This Court's authority to reverse and remand is set forth in 28 U.S.C.A. §2111. That statute provides that the Court can reverse and remand a case only if the Court finds that an error was harmful. It is the Supreme Court's version of the harmless error rule. The statute was obviously followed in *Liepelt*, as the Court found that the error in that case was harmful. The Court again followed the statute in *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473 (1981) by specifically ordering the lower court to address the claim of harmless error. Thus, the relevant federal statute and the Supreme Court cases cited above indicate that the federal courts should apply a harmless error rule to this case. The holding of the appellate court is consistent: The harmless error rule applies to this case.

The authority for the federal courts to reverse and remand is also found in Rule 61, Federal Rules of Civil Procedure. That rule provides that a trial court can be reversed only if the court committed an error that was harmful. It is another federal harmless error rule. The rule has been followed

in at least seven cases decided by the federal courts of appeal, and the harmless error rule is clearly the majority rule in the federal courts. Of the two Fifth Circuit cases cited by Petitioner, both were decided prior to the Supreme Court's holding in *Gulf Offshore* and one of the cases does not even discuss the issue before this Court.

The Court of Appeals holding, that the harmless error rule will apply to this case, is consistent with the holdings in *Liepelt, Gulf Offshore*, seven federal cases from the Second, Third, Eight and Ninth Circuits, as well as 28 U.S.C.A. §2111 and Rule 61, Federal Rules of Procedure. Quite simply, there is no conflict between the holding of the appellate court and the relevant federal authority.

In any event, the trial court's refusal to give the non-taxability instruction was correct for two reasons. First, the instruction was impossible to apply under the facts of this case. It referred to Hernandez's recovery of "the net, after-tax income." It then indicated that after-tax income was the same as "take-home pay". The evidence during trial was very clear that Hernandez's net, after-tax income was <u>not</u> the same as his take-home pay. In light of this evidence, the instruction was not only incorrect, but it would have been impossible for the jury to apply.

Second, the instruction was incorrect. It is undisputed that Hernandez is allowed to recover the fringe benefits that he had lost as part of his loss of earning capacity. The requested instruction specifically tells the jury that Hernandez is <u>not</u> allowed to recover his loss of fringe benefits. The instruction would have prevented the recovery of a recognized element of damage. Any instruction that tells the jury not to award a recognized element of damage is properly refused.

## ARGUMENT ON REASON NO. I

*The requested tax instruction was properly refused as it was an incorrect statement of the law and was impossible to apply to the facts of this case.*

Recognizing that the facts of each case vary, the drafters of the Fifth Circuit's Pattern Jury Instructions for Civil Cases included the following caveat:

> "Unlike criminal prosecutions under a given statue ... the instructions given in many civil cases will differ according to the facts even though the claim, cause of action or theory of recovery is the same. ... extreme care should be exercised in every case to insure that the instruction as worded correctly states the law as applied in that case ..." (emphasis in original) *Pattern Jury Instructions - Civil Cases*, District Judges Association - Fifth Circuit, 1983, p. v.

One issue in this appeal is whether or not the requested instruction correctly applies the law to the facts of this case. Respondent submits that the instruction fails for two reasons.

First, it fails to consider that Petitioner provided fringe benefits to Hernandez. These benefits were paid for by Petitioner and were estimated to be equal to 42.8% of Hernandez's salary. Hernandez lost the benefits as a result of his inability to return to work for Petitioner. Under these circumstances, the cost or value of the fringe benefits is a part of the compensation that Hernandez has lost and he is entitled to recover for this loss. *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985). *Culver v. Slater Boat Co.*,

722 F.2d 114 (5th Cir. 1983) cert. denied 82 L.Ed.2d 842, 104 S.Ct. 3537 (1984). *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970) cert. denied 402 U.,S. 987, reh. den. 403 U.S. 924, 940.

Having identified one of the facts in this case (the loss of fringe benefits) and having identified the law that applies (Hernandez's right to recover for the loss), let us examine the effect of the requested Instruction. It states, in pertinent part:

> "In computing the amount of damages which you may find the Plaintiff is entitled to recover for past or future lost earnings, the Plaintiff is entitled to recover only the net, after-tax income. In other words, Plaintiff is entitled to recover only "take-home pay" which you find he has lost in the past or will lose in the future."

Clearly, this instruction would prevent Hernandez from recovering for the loss of his fringe benefits. Those benefits are not "after-tax income" and do not, by any stretch of the imagination, fit the common definition of "take-home pay". This instruction would have deprived Hernandez of the rights set forth in *Williams, Culver* and *Petition of United States Steel*. As such, this instruction misstates the law that applies to the facts of this case.

It is true that the instruction may be appropriate in some other case. For instance, in an F.E.L.A. action where the injured worker was able to return to work for the railroad, and therefore suffered no loss of fringe benefits, the instruction might be appropriate. However, that hypothetical case is not before us and, for the facts of the case that is before us, the instruction misstates the law.

Second, the instruction failed to consider that the evidence showed that the amount of Hernandez's "take-home pay" was different from the amount of his "after-tax income". This difference was made quite clear during the testimony of Dr. Dillman. Petitioner's counsel repeatedly indicated that Petitioner's records showed "take-home pay" that was much less than Dr. Dillman's "after-tax income". Dr. Dillman, using Hernandez's tax returns, indicated a 1986 gross income of $32,347, with taxes of $3,162, for an after-tax income of $28,245. Petitioner's counsel repeatedly indicated that Hernandez's "take-home pay" in 1986 was only $20,263.91. Obviously, Petitioner was deducting something from Hernandez's paycheck other than income taxes. Two problems arise from this situation.

First, the procedure used to compute an injured person's economic losses is to start with a "net" figure computed by taking the gross earning of the injured person, adding the fringe benefits, and then subtracting income taxes. *Culver v. Slate Boat Co., supra.* This procedure specifically allows an injured person or his economist to calculate the damages based on this net figure. The instruction would deprive Hernandez of this right by requiring him to use "take-home pay". Under the facts of this case, "take-home pay" is lower than the figure that Hernandez was entitled to use. By depriving him of the higher figure authorized in *Culver*, the instruction misstates the law that applies to the facts of this case.

Second, the instruction is impossible to use and would hopelessly confuse a jury. It assumed that the "take-home pay" would be identical to the "after-tax income". This assumption was incorrect. How, then, was the jury to follow the instruction? Should the jury use Dr. Dillman's figure or Petitioner's figure? These questions cannot be answered.

Certainly an instruction that cannot be used is an instruction that should not be given.

Clearly, if Petitioner had requested a correct instruction, it should have been given. Equally clear, Petitioner was not entitled to an instruction that misstated the law or was impossible to apply. Petitioner could have requested the simple instruction approved in *Liepelt*:

> "Your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." 444 U.S., at 492.

Instead, Petitioner choose an incorrect instruction and the trial court properly refused it.

## ARGUMENT ON REASON NO. II

*The application of a harmless error rule is consistent with the decisions of this Court.*

The issue now before the Court is whether or not the harmless error rule, Rule 81, Texas Rules of Appellate Procedure, is contrary to any authority from this Court.

This Court's authority to review and reverse a lower court is found (in part) in 28 U.S.C.A. §2111. That statute provides:

> **§2111 - Harmless Error**
> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Obviously this is a harmless error rule, the Court's equivalent to Rule 81, Texas Rules of Appellate Procedure.

Petitioner has made the claim that the Supreme Court has ignored 28 U.S.C.A. §2111 and has held that the harmless error rule does not apply to F.E.L.A. cases. Even a cursory review of the two cases cited by Petitioner will show the absurd nature of this claim.

In *Norfolk and Western Ry Co. v. Liepelt*, 444 U.S. 490 (1980), the state court jury returned a verdict of $775,000 for the pecuniary losses. This figure was two and one-half times larger than the $302,000 figure that the economist had testified to. Of significance was the fact that the economist did not deduct income taxes from his figure, and the trial court had excluded all testimony regarding how income taxes would have affected the figure of $302,000. In addition, the trial court refused to give a non-taxability instruction. The court addressed both issues holding:

> 1) Evidence of how income taxes will effect future earnings is admissible; and
>
> 2) The non-taxability instruction (the one requested in that case) should have been given.

It is clear that the railroad had been harmed by the trial court's action in *Liepelt*. Not only was the instruction refused, the trial court had also refused all evidence that would show the jury what effect taxes had on future earnings. Without this evidence, it is obvious that the jury's award would include an amount for income taxes, thereby harming the railroad. The railroad did in fact argue that it was harmed. ". . . petitioner contends that it was prejudiced by the trial judge's refusal to instruct the jury . . . " *Id.*, at 693. After considering all the evidence and argument, the Court agreed, concluding that harm had occurred: "It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery." *Id.*, at 696.

The *Liepelt* opinion can be summarized as follows:

1. The Court was required to find harm before it could reverse (28 U.S.C.A. §2111).

2. The railroad argued that it was harmed (*Id.*, at 693)

3. The railroad was obviously harmed (all testimony about the effect of taxes had been excluded, and the instruction was refused.

4. The court found harm. *Id.*, at 696)

The Court never said that the harmless error rule was going to be ignored. The court never said that harm could be presumed. On the contrary, the Court examined the facts and determined that harm had occurred. In the case at bar, the appellate court has examined the facts and determined that Petitioner has not shown, and has not even argued, that it was

harmed. This holding does not conflict with *Liepelt* in any way and it is consistent with the only other Supreme Court decision on point.

In *Gulf Offshore Co. v. Mobil Oil Corporation*, 453 U.S. 473, 69 L.Ed.2d 784, 101 S.Ct. 2870 (1981) the Court was deciding whether or not a non-taxability instruction was required in actions governed by the Outer Continental Shelf Lands Act, a federal statute. After concluding that state law would provide a partial answer to this issue, the Court remanded the case to the state court so that a determination of state law could be made. The Court concluded its opinion with this order:

> "If the court decides that is was the error to refuse the instruction, it may then address respondent's argument that petitioner was not prejudiced by the error." *Id.*, at 798.

This mandate for the state court to address the harmless error argument indicates the Supreme Court's position on the harmless error rule. If the Court was of the opinion (as Petitioner claims) that it was not necessary to show harm, the Court would have said so; the Court would not have wasted the state court's time by ordering it to address the argument. The harmless error argument has to be addressed if, and only if, the harmless error rule is applicable. Logic indicates that if the Supreme Court order is to address the harmless error argument, then the harmless error rule must be in full force and effect.

Obviously, Appellant's interpretation of *Gulf Offshore* is wrong and, equally obvious, the Supreme Court requires a showing of harm, as does 28 U.S.C.A. §2111.

Appellant has not shown any harm. In light of Dr. Dillman's undisputed testimony, and in light of the fact that the verdict for past and future economic losses totalled $448,520, while the testimony on those issues totalled over one million dollars, it is apparent that Appellant has not been harmed.

## ARGUMENT ON REASON NO. III

*The application of a harmless error rule is consistent with the decisions of the Second, Third, Eight and Ninth Circuits.*

The federal authority in support of the harmless error rule is extensive. 28 U.S.C.A. §2111 has already been quoted. It is a harmless error rule.

Rule 61, Federal Rules of Civil Procedure, is also a harmless error rule. That rule provides:

> **Rule 61 - Harmless Error**
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The cases from the Second, Third, Eighth and Ninth Circuits are consistent with the harmless error rule.

In *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981) an F.E.L.A. claim was pursued against a railroad. The trial court refused to give a requested instruction on the non-taxability of the award. The court held that the failure to instruct on non-taxability is harmless error unless the appellant establishes the prejudicial effect of the trial court's refusal. The court noted that a great disparity between the evidence and the verdict would be one indication that the jury had improperly inflated the award. The court then concluded that the total award of $903,000, when compared with the lost wage testimony of $692,000, did not indicate an improper increase.

In *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980) cert. denied, 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed.2d 349 (1981) an F.E.L.A. claim was pursued against a railroad. The trial court refused to give a requested instruction on the non-taxability of the award. The court held that the failure to give the instruction is subject to the harmless error rule. The court held that there would be no reversal unless the railroad established harm or prejudice. The court then considered the evidence and found no evidence of harm.

*Raycraft v. Duluth, Missabe & Iron Range Ry.*, 472 F.2d 27 (8th Cir. 1973) also involved a F.E.L.A. claim, and again the trial court refused to give a non-taxability instruction. The court felt that a harmless error rule should apply, noting:

> In the instant case . . . there is no indication that the jury verdict resulted from a misapprehension of tax consequences. The members of this panel, if they felt it necessary to rule on the issue, would not hold the action of the trial court erroneous. *Id.*, at 33.

Another Eight Circuit case applying the harmless error rule to jury instructions in a F.E.L.A case is *Meyers v. Union Pacific Railroad Co.*, 738 F.2d 328 (Eight Cir. 1984). There have been similar holdings in the Second, Third and Ninth Circuits.

In *McWeeney v. New York, New Haven & Hartford Railroad*, 282 F.2d 34 (2nd Cir. 1960) cert. denied 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93 (1960) the Court used the harmless error rule to avoid reversing an F.E.L.A. claim when the trial court erroneously failed to give a non-taxability instruction.

In *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971) cert. denied 404 U.S. 883, (1971) the Court adopted the rule that non-taxability instructions were required, when requested by the defendant. In deciding whether or not the new rule should be given prospective application only, or whether it should be used to reverse the instant case, the Court noted that there was no evidence that the jury had considered taxes or inflated the award. Accordingly, the Court affirmed. The harmless error rule had been used to avoid a reversal.

In *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034 (9th Cir. 1975) the trial court failed to give a non-taxability instruction. The Court held that there was no indication that the jury mistakenly considered taxes and raised its verdict. In

the absence of such an indication, the Court stated that "it would be improper to overturn the jury's verdict on the mere speculation of prejudice." *Id.*, at 1037.

The opinion of the appellate court is in accord with Rule 81, Texas Rules of Civil Procedure; Rule 61, Federal Rules of Civil Procedure; 28 U.S.C.A. §2111; and 7 opinions from the Court of Appeals for the Second, Third, Eighth and Ninth Circuits.

Against this authority, Petitioner cites only two cases (*O'Byrne* and *Lang*). Both of the cases were decided prior to this Court's decision in *Gulf Offshore* (discussed previously). In light of the Court's recognition of the harmless error rule in *Gulf Offshore*, it is likely that these Fifth Circuit cases were overruled. It should be noted that one of the cases cited by Petitioner (*Lang*) does not even address the harmless error rule: the court just doesn't say whether it did or did not find prejudice. Silence on this issue does not support Petitioner. Since the court is silent, one would assume that the court is following Rule 61, Federal Rules of Civil Procedure and 28 U.S.C.A. §2111.

In light of the overwhelming authority in support of the appellate court's decision in this case, and in light of the fact that *Gulf Offshore* was decided after the cases cited by the Petitioner, there is no reason to believe that the Fifth Circuit does not follow the harmless error rule.

## CONCLUSION

The petition for a writ of certiorari should be denied as it was appropriate to refuse the instruction. Moreover, the trial court's action was consistent with precedents from this Court and other courts, as well as the federal statutes and rules cited above.

Respectfully submitted,

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JOHN A. CARWILE
*Counsel for Respondent*

September 1991

No. 91-293



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

SOUTHERN PACIFIC TRANSPORTATION CO.,
*Petitioner,*
v.
JOSE HERNANDEZ,
*Respondent.*

**On Petition for Writ of Certiorari to the Texas Court of Appeals**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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**On Petition for Writ of Certiorari to the Texas Court of Appeals**

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The Association of American Railroads ("AAR") respectfully requests leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in this case. Petitioner has consented to the filing of the brief. Counsel for Respondent has not responded to several requests for consent.

AAR is a non-profit trade association representing the Nation's major railroads. Its members account for approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. AAR files briefs as *amicus curiae* before administrative agencies and the courts in cases of interest to its members.

The issue presented by the petition concerns this Court's decision in *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980). In *Liepelt*, this Court established as a matter of federal common law that juries determining damages for personal injury actions under the Federal Employers' Liability Act (FELA) must be instructed that a plaintiff's damages award is not subject to income tax. The question presented in this case is whether a trial court's refusal so to instruct the jury in a FELA action is reversible error in all cases or only in those instances where the face of the verdict clearly shows that the jury improperly inflated the verdict to compensate for taxes it mistakenly believed would be assessed.

All members of the AAR are subject to FELA, and an AAR survey shows that in 1990 alone the railroad industry paid out close to one billion dollars in FELA claims.[1] Total gross operating revenues for the year were approximately $30 billion.[2] AAR members are confronted with defending thousands of FELA lawsuits each year, and are therefore vitally interested in practice and procedure under FELA.[3] Given the substantial amount of money paid out under FELA, the possibility of improperly inflated awards creates a significant financial burden on AAR members. If the Texas appellate court's decision is allowed to stand, AAR's members will have been deprived of the protection afforded them by *Liepelt*.

AAR seeks to file this brief to emphasize the importance of this case to the railroad industry and to support Petitioner's position that the refusal of a court to properly instruct the jury pursuant to *Liepelt* cannot be con-

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[1] AAR 1990 Report of Claims and Litigation Experience at 2-9, 2-10. Railroads paid out $877,431,702 in claims. When the cost of administering and defending claims is considered, the total cost exceeds one billion dollars.

[2] *Id.*

[3] In 1989 nearly 6,000 FELA suits were filed, and in 1990 nearly 8,000. *Id.* at 2-9.

sidered harmless error. Given the widespread conflict among the state and federal courts concerning this issue —including state courts of last resort and federal courts of appeals—*amicus* seeks the opportunity to urge this Court to review the decision below.

For the foregoing reasons, the Association of American Railroads respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for certiorari be granted.

Respectfully submitted,

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## QUESTIONS PRESENTED

I. Whether the Texas Court of Appeals, in conflict with the United States Court of Appeals for the Fifth Circuit as well as the courts of several States, erroneously concluded that a trial court's refusal to instruct the jury, in conformity with *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), that a damages award would not be subject to income tax, required reversal only when the resulting jury verdict exceeded the highest amount of damages supported by the plaintiff's evidence at trial.

II. Whether the Texas Court of Appeals, in conflict with the courts of other States, erroneously concluded that state and not federal law should govern the issue of when, if ever, a jury verdict can be affirmed notwithstanding a trial court's failure to give a *Liepelt* instruction.

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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**On Petition for Writ of Certiorari to the Texas Court of Appeals**

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## BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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### INTEREST OF *AMICUS CURIAE*

The interest of *amicus* is set forth in the accompanying Motion for Leave to File Brief *Amicus Curiae*.

### INTRODUCTION AND SUMMARY OF ARGUMENT

In *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980), this Court ruled that in actions arising under federal law, a trial court must instruct a jury that damages awards are not subject to federal or state income tax. This case presents an important and recurring issue that, since *Liepelt* was decided, has divided the Nation's federal and state appellate courts: whether failure to instruct a jury as required by *Liepelt* is harmless error when the damages awarded fall within the range that had been requested by the plaintiff. *Amicus* urges this

Court to grant certiorari to establish a uniform national standard for appellate review of the continuing stream of cases in which trial courts have failed to give the *Liepelt* instruction.

This case arises under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"). Petitioner Southern Pacific Transportation Company ("Southern Pacific") was sued under FELA by one of its employees, Respondent Jose Hernandez, in Texas state court.[1] Mr. Herandez, a laborer, sought damages for injuries incurred in the course of his employment with Southern Pacific. He presented expert testimony as to the present value of his lost future earnings. After offsets for contributory negligence and other matters, Hernandez received a damages award of $422,295.47, an amount within the range of damages identified by Mr. Hernandez's expert. *See Southern Pacific Transportation Co. v. Hernandez*, 804 S.W.2d 557, 561 (Tex. Ct. App. 1991).

At trial, Southern Pacific made a timely request for the following jury instruction:

> Under the law, any award made to the Plaintiff in this case is not subject to federal or state income tax. Therefore, in computing the amount of damages which you may find the Plaintiff is entitled to recover for past or future lost earnings, Plaintiff is entitled to recover only the net, after-tax income.

This instruction was drawn verbatim from the pattern instructions of the Fifth Circuit District Judges Association, and conformed to the requirements this Court established in *Norfolk & Western Ry. v. Liepelt*, 444 U.S. at 496-98. *Liepelt*, a FELA case like the present one, squarely held that juries adjudicating damages under federal recovery statutes such as FELA must be instructed *not* to adjust damages awards upward to com-

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[1] FELA permits concurrent state and federal jurisdiction. 45 U.S.C. § 56.

pensate for presumed income tax liabilities.[2] The state trial court in this case, however, without explanation, refused Southern Pacific's requested *Liepelt* instruction, and gave no instruction about income tax.

On appeal, Southern Pacific raised its properly preserved challenge to the jury verdict on the basis of the trial court's refusal to give the requested *Liepelt* instruction. The Court of Appeals of Texas agreed that the trial court's refusal to give the instruction was error, 804 S.W.2d at 561, but, finding that the error was harmless, nonetheless affirmed the verdict.

In determining whether the trial court's error required reversal, the Court of Appeals noted a split in governing federal authority on whether the error was reversible: the Fifth Circuit requires reversal whether or not the damages award exceeded the requested damages, and the Eighth Circuit requires evidence of inflation of the award. *Compare O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285 (5th Cir. 1980), *with Flanigan* v. *Burlington Northern Inc.*, 632 F.2d 880 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). To resolve the question, however, the Court of Appeals—in conflict with the approach taken by other States—looked not to federal law but to a provision of *Texas* law on harmless error. The court below specifically relied on Texas Rule of Appellate Procedure

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[2] In *Liepelt*, a wrongful death action brought in Illinois state court under FELA, the jury awarded $775,000 to the plaintiff. *Liepelt*, 444 U.S. 497. The damages estimate provided by the plaintiff's expert was $302,000. The Court noted the difference between the award and the plaintiff's evidence and speculated that it was possible that the jury, composed of tax-conscious citizens, assumed that the award would be subject to tax and therefore inflated the award to compensate for that possible tax. The Court held, however, that "[w]hether or not" its speculation as to what the jury assumed was accurate, "it was error to refuse the requested instruction." *Id.* at 497, 498. The Court accordingly reversed the decision, and remanded the case for a new trial with a proper instruction that the award in a FELA case would not be taxed.

81(b)(1), which provides that errors of law do not justify reversal of trial court judgments unless "the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper verdict." 804 S.W.2d at 561.

Applying this state-law standard, the Court of Appeals concluded that the trial court's error did not cause an improper verdict for two related reasons. First, the verdict did not exceed the range of damages Respondent's expert had claimed was supportable on the evidence. Second, Respondent's expert testified that he had taken income tax liability into account when estimating damages. Under these circumstances, the court concluded, the standard of Tex. R. App. P. 81(b)(1) was not satisfied. The Texas Supreme Court denied review. *See* Appendix B to Petition for Certiorari at 14a.

## REASONS FOR GRANTING THE WRIT

The Petition for Certiorari correctly identifies a conflict in the Federal Courts of Appeals as to whether, and under what circumstances, a reviewing court may affirm a jury verdict despite the trial court's failure to give a *Liepelt* instruction. In the wake of *Liepelt*, the Fifth Circuit held that a FELA damages award must be reversed because of failure to give a proper income tax instruction, irrespective of any evidence of inflation of the award. *See O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d at 1286. The Eighth Circuit, in contrast, requires evidence of inflation to justify a reversal. *See Flanigan v. Burlington Northern Inc.*, 632 F.2d at 889.

Without more, the conflict in circuit authority identified by Petitioner justifies plenary review. *See* Supreme Court Rule 10.1(A). The conflict identified by Petitioner is, however, symptomatic of a pervasive and continuing confusion in this Nation's appellate courts—*state* as well as federal—over the principles that should govern appel-

late review of trial court failure to give a *Liepelt* instruction. The court below is not the first state court to recognize that the "Federal Circuit Courts of Appeal are not in agreement on this issue," *see Anderson v. Burlington Northern, Inc.*, 709 P.2d 641, 646 (Mont. 1985), *cert. denied*, 476 U.S. 1174 (1986), or to struggle with the proper standards for reviewing *Liepelt* error. As *amicus* will show, the persistence of divergent results in *state* courts adjudicating FELA cases—and even between state and federal courts for the same jurisdiction—underscores the need for plenary review of the question presented here. The time has come for this Court to establish a uniform national standard for determining when, if ever, *Liepelt* error may be deemed harmless.

Because FELA actions may be brought in state as well as federal court, 45 U.S.C. § 56, state courts are frequently responsible for applying the federal law necessary to resolve those cases. The appellate courts of fourteen States have faced the question whether a trial court commits reversible error when it fails to comply with *Liepelt*. Of those fourteen, four have held that a trial court's refusal to give the *Liepelt* instruction constitutes reversible error, without reference to the amount of the award. Ten States have held that, although trial courts err in refusing to give the instruction, the error is harmless when the amount of an award does not suggest that the jury has inflated it to compensate the plaintiff for taxes, or, conversely, that the error requires reversal when it appears the jury has inflated the award.

For example, the Ohio Court of Appeals held in 1987 that a trial court's refusal to give the *Liepelt* instruction invariably mandates reversal, without regard to the size of the verdict. *Watson v. Norfolk & Western Ry.*, 507 N.E.2d 468 (Ohio Ct. App. 1987). The plaintiff argued on appeal that because defendant could not show that the jury inflated the verdict due to tax considerations, reversal was improper. The court noted, however, that

"[t]he Supreme Court [in *Liepelt*] did not require proof of an inflated award before reversing for failure to give the tax instruction." *Id.* at 471. Citing the Fifth Circuit's decision in *O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285 (5th Cir. 1980), the Ohio court reversed the trial court and remanded for a new trial.

Three other state courts have reached similar results. *See Onion v. Chicago & Illinois Midland Ry.*, 547 N.E.2d 721, 723 (Ill. App. Ct. 4th Dist. 1989) (noting, without reference to amount of award, that "since the instant case is based on Federal law, the *Liepelt* instruction should have been given to the jury. The trial court's failure to do so was reversible error."); *Sheff v. Conoco, Inc.*, 311 S.E.2d 14 (N.C. Ct. App. 1984) (reversing decision without reference to amount of award when trial court refused instruction); *Yost v. Union R.R.*, 551 A.2d 317 (Pa. 1988) (finding reversible error without reference to amount of jury award when trial court refused to give *Liepelt* instruction), *appeal denied*, 562 A.2d 827 (1989).

Other States have held that a trial court's failure to give the *Liepelt* instruction is reversible error only if the damages award suggests prejudice. Relying frequently on *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), these state courts typically compare the amount of the jury award with the evidence presented at trial. If the award does not exceed the damages claimed by the plaintiff, those courts have concluded that the jury did not inflate the amount to compensate for presumed income tax liability. *See Marlow v. Atchison, Topeka & Santa Fe Ry.*, 671 P.2d 438 (Colo. Ct. App. 1983) (harmless error where defendant cannot show jury inflated award); *Caribe Tugboat Corp. v. Duffy*, 427 So. 2d 227 (Fla. Dist. Ct. App. 1983) (harmless error considering evidence presented and relative amount of award), *review denied*, 436 So. 2d 98 (1983), *cert. denied*, 464 U.S. 1041 (1984); *Marynik v. Burling-*

*ton Northern, Inc.*, 317 N.W.2d 347 (Minn. 1982) (harmless error when disparity between jury award and evidence may be based on fact that damages for pain and suffering are recoverable); *Seaboard Systems R.R. Inc. v. Cantrell*, 520 So. 2d 479 (Miss. 1987) (when court could not say whether jury inflated award for tax reasons or not, error was reversible); *Bair v. St. Louis-San Francisco Ry.*, 647 S.W.2d 507 (Mo. 1983) (en banc) (harmless error although jury awarded amount in excess of plaintiff's projected income because pain and suffering were proper components of verdict and no other evidence suggested jury inflated award), *cert. denied*, 464 U.S. 830 (1983); *Anderson v. Burlington Northern, Inc.*, 709 P.2d 641 (Mont. 1985) (harmless error when jury awards the amount, or less than the amount, projected by economist); *Fritz v. Consolidated Rail Corp.*, 508 N.Y.S.2d 422, 501 N.E.2d 30 (1986) (reversible error where jury awarded sum in excess of what counsel asked for in summation); *Faulkenberry v. Kansas City Southern Ry.*, 661 P.2d 510 (Okla. 1983) (harmless error where no disparity between amount of award and evidence), *cert. denied*, 464 U.S. 850 (1983).[3]

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[3] The confusion shows no signs of abating. The fourteen decisions discussed above are not limited to the one or two years following the 1980 *Liepelt* decision. In the instant case, of course, the Texas appellate court first faced the issue in 1991. And, between 1982 and 1991, with the exception of 1990, at least one state appellate court per year has ruled on the reversible/harmless error issue. Nor is the case law evolving toward a consistent position.

It is likely that state appellate courts will continue to face this issue despite *Liepelt*'s mandate. Many States have rejected the *Liepelt* instruction in cases arising under state law. *E.g., Yukon Equipment, Inc. v. Gordon*, 660 P.2d 428, 434 (Alas. 1983), *overruled on other grounds, Williford v. L.J. Carr Invest., Inc.*, 783 P.2d 235 (Alas. 1989); *Young v. Environmental Air Products, Inc.*, 665 P.2d 88, 95 (Ariz. Ct. App. 1982) *affirmed as modified*, 665 P.2d 40; *W.M. Bashlin, Co. v. Smith*, 643 S.W.2d 526, 532 (Ark. 1982); *Henninger v. Southern Pacific Co.*, 59 Cal. Rptr. 76, 80 (Cal. Ct. App. 1967); *Gorham v. Farmington Motor Inn, Inc.*, 271 A.2d 94, 96-97 (Conn. 1970); *Good Samaritan Hosp. Assoc., Inc. v. Saylor*, 495

The divergence in approach is substantial even among the state courts that apply harmless error analysis. In some jurisdictions, the burden appears to be on the defendant to demonstrate prejudice from the failure to give instructions. *See, e.g., Marlow v. Atchison, Topeka & Santa Fe Ry. Co.*, 671 P.2d at 442-43 (harmless error where "defendant failed to point to any evidence that the jury inflated the award.") In others, the plaintiff appears to have the burden to show the absence of prejudice. *Seaboard Systems R.R., Inc. v. Cantrell*, 520 So.2d at 485 (reversible error when court could not say whether jury inflated award for tax reasons). Some state courts affirm awards when they do not exceed the evidence of lost earnings, *Anderson v. Burlington Northern, Inc.*, 709 P.2d at 646, while others affirm even awards that exceed the lost earnings component. *Marynik v. Burlington Northern, Inc.*, 317 N.W.2d at 351.

Moreover, state courts appear confused as to whether state or federal law should govern the treatment of *Liepelt* error on appeal. A proper understanding of the

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So.2d 782 (Fla. Ct. App. 1986); *Newlin v. Foresman*, 432 N.E.2d 319, 325-326 (Ill. Ct. App. 1982); *Highshew v. Kushto*, 134 N.E.2d 555, 556 (Ind. 1956), *pet. denied*, 135 N.E.2d 215; *Stover v. Lakeland Square Owners Assoc.*, 434 N.W.2d 866, 871 (Iowa 1989); *Paducah Area Public Library v. Terry*, 655 S.W.2d 1923 (Ky. Ct. App. 1983); *Tennis v. General Motors Corp.*, 625 S.W.2d 218, 227 (Mo. Ct. App. 1981); *Maricle v. Spiegel*, 329 N.W.2d 80, 86 (Neb. 1983); *Scallon v. Hooper*, 293 S.E.2d 843, 845 (N.C. Ct. App. 1982); *review denied*, 295 S.E.2d 480; *Terveer v. Baschnagel*, 445 N.E.2d 264, 268-69 (Ohio Ct. App. 1982); *Green v. Denney*, 742 P.2d 639, 643 (Or. Ct. App. 1987), *review denied*, 749 P.2d 136; *Rivera v. Philadelphia Theological Seminary*, 507 A.2d 1, 22 (Pa. 1986); *Dehn v. Prouty*, 321 N.W.2d 534, 538-39 (S.D. 1982); *Barnette v. Doyle*, 622 P.2d 1349, 1367 (Wyo. 1981). *But cf., Psychiatric Institute of Washington v. Allen*, 509 A.2d 619 (D.C. Ct. App. 1986). It appears that this state court hostility to the *Liepelt* rule in state law actions has resulted in a frequent and continuing failure of state courts to give the *Liepelt* instruction in cases arising under FELA—as well as some disposition in state appellate courts to find error harmless on indefensible grounds.

relation between federal and state law suggests that *federal* law governs this question because it vitally affects substantial federally-created statutory rights. *See* Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 OHIO ST. L. J. 384 (1956). Some state courts properly appear to have treated the effect of *Liepelt* error as a federal question. *See, e.g., Watson v. Norfolk & Western Ry.*, 507 N.E.2d at 471; *Faulkenberry v. Kansas City Southern Ry.*, 661 P.2d at 512. Other state courts, including the court below, appear to have treated the issue as one of *state* law. In this case, for example, the Texas Court of Appeals applied the reversible error standard of Texas R. App. P. 81(b)(1), and did not conduct any independent analysis as to whether *federal* law permitted harmless error analysis. 804 S.W.2d at 561. *See also Yost v. Union R.R.*, 551 A.2d 317 (applying Pennsylvania law).

This lack of uniformity is fundamentally at odds with the general principle that federal law should have the same meaning in every jurisdiction. *See* R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE § 4.4, 197 (6th ed. 1986). As this Court held in *South Buffalo Ry. v. Ahern*, 344 U.S. 367, 371 (1953), FELA was intended to ensure a uniform application of law to the nation's railroads. The present nationwide confusion over the consequences of *Liepelt* error vitiates that federal policy, as well as the general goal of uniform application of federal law, and provides a substantial reason for granting the petition for certiorari.

Indeed, AAR's member railroads are presently subject to differing standards of law depending on not only the State in which a case is brought, but also whether a case is brought in state or federal court. Had the present case been filed in *federal* court in Texas, for example, the court would have been bound by *O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285 (5th Cir. 1980), which requires reversal for *Liepelt* error without any showing that the verdict was inflated. The risk of forum shopping

in the present confused situation is a substantial additional reason for plenary review.[4]

Review is also warranted because the ill-defined harmless error rule applied below threatens the "strong federal policies of fairness and efficiency in litigation of federal claims" advanced by the *Liepelt* instruction. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 487 (1981). Requiring proof that a damages award exceeded the damages supported by plaintiff's evidence can hardly be called a rule of harmless error. In a typical case, the plaintiff's evidence will support a *range* of damages awards. The range will depend on what the evidence shows as to the extent of disability, the plaintiff's future earnings power, the proper discount rate for calculating present value, the proper level of compensation for pain and suffering, and a host of other variables. That a verdict ultimately falls below the upper boundary of verdicts supportable by the evidence provides very little guarantee against improper inflation of the kind *Liepelt* is meant to prevent. A jury might well conclude that the damages were near the low end of the range of supportable verdicts, inflate the award to compensate for presumed tax liability, and render a verdict that by happenstance remains below the upper limit of verdicts arguably supported by the plaintiff's evidence. In such a case, the defendant would be harmed;

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[4] The issue has even broader significance because the *Liepelt* rule applies not only in FELA actions but in many other cases arising under federal statutes authorizing recovery for injuries, including: the Jones Act, *Nesmith v. Texaco*, 491 F. Supp. 561, 563 (W.D. La. 1980), *modified in part per curiam on other grounds*, 727 F.2d 497 (5th Cir. 1984), *cert. denied*, 469 U.S. 855 (1984), actions brought pursuant to the Death on the High Seas Act, *Solomon v. Warren*, 540 F.2d 777, 788 n.12 (5th Cir. 1976), *cert. dismissed sub nom. Warren v. Serody*, 434 U.S. 801 (1977), and perhaps in actions brought pursuant to 42 U.S.C. § 1983 involving awards for loss of future earnings, *see* Note, "Income Taxation and the Calculation of Tort Damages Awards: The Ramifications of *Norfolk & Western Ry. v. Liepelt*," 38 WASH. & LEE L. REV. 289, 301 (1981).

yet, the court below—as well as those in ten other States and at least one federal circuit—would deem the error harmless.

The court below also made a fundamental error in assuming that harmless error could be premised on the fact that the plaintiff's expert testimony took income tax liability into account. By merely informing a jury that damages calculations account for income tax, an expert does not give a jury enough information to know it should not adjust its verdict to compensate for anticipated taxes. The jury receives sufficient information only if it is informed that the sum it awards will not be taxed. Indeed, if the jury believes that taxes will be levied against the verdict, expert testimony like that given in this case may well *increase* the likelihood of inflation of the award, because the jury might fear that without inflation the award would be taxed *twice*: once in the jury room, when only take-home pay would be awarded, and a second time by the Internal Revenue Service. Furthermore, the testimony of an expert cannot substitute for instruction from the trial judge as to the proper standard for measuring damages. *See Seaboard Systems R.R., Inc.*, 520 So.2d at 484.

At bottom, the harmless error analysis undertaken below, and endorsed by many state courts as well as the Eighth Circuit, is at odds with the ruling in *Liepelt*. In that case, the Court overturned the jury's verdict without any inquiry into whether the amount of the jury award exceeded the damages supported by the trial evidence. Although the Court speculated that the jury may well have increased its verdict to compensate for anticipated tax liabilities, the Court went on to make explicit its holding that reversal was required "whether or not" the jury had in fact compensated for anticipated taxes. Thus, *Liepelt* established a prophylactic rule, designed to protect defendants from the potentially serious financial effects of lay jurors' misconceptions about tax laws—*whether or*

*not* jury misconceptions can be shown to have affected a particular verdict. *Liepelt*, 444 U.S. at 496-98.

As this Court made clear in *Liepelt* and *Gulf Offshore*, instructing a jury that FELA awards are not subject to income tax is an important guarantee that this Nation's railroads will be protected against inappropriate and unfair jury inflation of damages awards in FELA cases. The strength of that guarantee now varies widely from State to State and Circuit to Circuit. Inconsistent appellate enforcement is, moreover, robbing the *Liepelt* rule of much of its protective force. That poses a particular threat to *amicus*'s member railroads. At present, FELA liability claims consume three percent of the annual operating revenues of these railroads—which amounts to almost a billion dollars per annum. *See* Motion For Leave To File Brief *Amicus Curiae*, at 2. *Liepelt* represented a salutary effort to inject a degree of fairness into a system that has seen an inexorable growth in liability,[5] and, by the simple expedient of a brief jury instruction, to eliminate one egregious sort of unjustifiable windfall to plaintiffs. Plenary review is needed to establish a uniform national standard and to restore the *Liepelt* rule as an effective protection against arbitrary, unfair and inefficient verdicts in FELA cases.

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[5] Since *Liepelt* was decided in 1980, annual FELA liability has increased by 156 percent, from $343 million to $877 million. AAR 1990 Report of Claims and Litigation Experience at 2-10; AAR 1989 Report of Claims and Litigation Experience at 2-8.

## CONCLUSION

For all the foregoing reasons, as well as those set forth in the Petition for Certiorari, this Court should grant certiorari.

Respectfully submitted,

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September 18, 1991

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NO. 91-293

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

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SOUTHERN PACIFIC TRANSPORTATION CO., PETITIONER,
v.
JOSE HERNANDEZ, RESPONDENT

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## ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases*

***Statutes***



***Miscellaneous***

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner, Southern Pacific Transportation Co. ("Southern Pacific"), asks that the Court consider this Reply Brief in Support of its Petition for Writ of Certiorari, pursuant to Supreme Court Rule 15.6.

### I.

### *Respondent Has Misconstrued The Issue Facing The Court.*

Respondent contends in his Response to the Petition for Writ of Certiorari (hereinafter "Response") that the issue before the Court is whether "the *Liepelt* instruction [is] subject to a harmless error standard of review, as all other

jury instructions are, or will an exception to the harmless error rule be created for *Liepelt* instructions?" Response at i.

This statement of the issue misses the point. Any failure to instruct a jury is subject to a harmless error test. The real issue is what constitutes harmless error and whether a defendant in an FELA case must affirmatively show that the jury improperly inflated the size of its award by taking imaginary taxes into account in order to show it was harmed by an erroneous refusal of the instruction.

Nor does Petitioner claim "that the Supreme Court has ignored 28 U.S.C.A. § 2111 and has held that the harmless error rule does not apply to F.E.L.A. cases." Response at 10. The point of the Petition is that *Liepelt* presumed harmful error as a result of the trial court's failure to give the instruction. *Liepelt* reversed the judgment for this failure to instruct without a direct showing that the jury improperly inflated its award because of a mistaken understanding of the award's taxability. 444 U.S. 497–98. See also, *O'Byrne v. St. Louis S.W. Ry.*, 632 F.2d 1285, 1287 (5th Cir. 1980) ("*Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested instruction.").

Respondent also claims that *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) supports the notion that the failure to give a *Liepelt* instruction is harmless error. "If the Court [in *Gulf Offshore*] was of the opinion . . . that it was not necessary to show harm, the Court would have said so; the Court would not have wasted the state court's time by ordering it to address the argument." Response at 12. This novel argument ignores the issue in *Gulf Offshore*, and the

fact that the Court did not decide whether a *Liepelt* instruction was required.

The claim in *Gulf Offshore* was governed by the Outer-Continental Shelf Lands Act ("OCSLA") rather than the FELA. The source of law in a FELA case is the federal common law articulated in *Liepelt*. *Gulf Offshore*, 453 U.S. at 486. OCSLA contains a choice of law provision mandating the application of state laws "to the extent that they are applicable and not inconsistent with this subchapter or other federal laws . . ." *Id.* at 485. In *Gulf Offshore* the Court had to consider whether the incorporation of Louisiana law in OCSLA would make a difference in the outcome of the case, but most definitely did not decide whether a *Liepelt* instruction was required.

The Court held that the lower court erred when it failed to consider whether Louisiana law required a *Liepelt* instruction. If it did not, the lower court would have to resolve whether OCSLA incorporated Louisiana law in this regard, or whether the Louisiana rule was displaced by *Liepelt*. 453 U.S. at 488 and n.18. The Supreme Court's directive to the lower court to first decide whether Louisiana required a *Liepelt* instruction is not an issue in this case, where it is undisputed that *Liepelt* applies. Respondent's argument is oblivious to this distinction.

Moreover, the Court went out of its way to state that had the issue been one of federal law under the FELA, rather than Louisiana law as incorporated by OCSLA, it would have reversed for the failure to give the instruction: "If Congress had been silent about the source of federal law in an OCSLA personal injury case, *Liepelt* would require that the instruction be given." 453 U.S. at 485, n.15, 486-87.

Respondent's contention that the remand to state court proves federal law does not require the non-taxability instruction unless there is an affirmative showing of improper jury inflation also ignores the subsequent decision on remand. The Texas Court of Appeals understood that the purpose of the Supreme Court's remand order was to decide whether Louisiana law required a *Liepelt* instruction, and if it did not, whether OCSLA incorporated Louisiana law or the federal rule. 628 S.W.2d 171, 174 (Tex. App.--Houston 1982, writ ref'd n.r.e.), cert. denied, 459 U.S. 945 (1982). The Texas court determined that *Liepelt* did not apply to an action brought under OCSLA because Louisiana law controlled. *Id.* at 175.

*Gulf Offshore* does not establish a new rule beyond *Liepelt* requiring the non-taxability instruction only upon an affirmative showing of improper inflation by the jury. To the contrary, *Gulf Offshore* supports Southern Pacific's position that no such affirmative showing is necessary, because it cites with approval the reasoning in *Liepelt* that no such showing is necessary or possible. 453 U.S. at 487, n.17.

While Petitioner maintains that both *Liepelt* and *Gulf Offshore*, support reversal here because no showing of improper inflation of the verdict is required to demonstrate harm, it is on this issue that the lower federal and state courts are divided. Even the Texas appellate court from which Petitioner appeals recognized this conflict. *Southern Pac. Transp. Co. v. Hernandez*, 804 S.W.2d 557, 561 (Tex. App. --San Antonio 1991, writ. denied), petition for cert. filed.

The clear language of *Liepelt* has inexplicably been disregarded by a small but significant number of lower state and federal courts. See generally, Brief Amicus Curiae of the

Association of American Railroads in Support of Petitioner (hereinafter "Brief Amicus Curiae") at 4–8. The Petition should be granted to reaffirm the important principle that the failure to give a *Liepelt* instruction is harmful error, and put to rest continuing doubts in this regard in the lower courts. In short, it is always reversible error for a trial court in an FELA case to refuse a non-taxability of award instruction, and Respondent's argument that Southern Pacific advocates abandonment of the harmless error standard of review is simply a misguided attempt to raise an issue having nothing to do with this appeal.

## II.
## *Respondent Does Not Address The Conflict In Authorities Which Supports Granting The Writ.*

Only by misconstruing the issue presented for review can Respondent make the claim that "there is no conflict between the holding of the appellate court and the relevant federal authority." Response at 5. This claim also flies in the face of the Texas appellate court's acknowledgement of a direct conflict between *O'Byrne* and *Flanigan v. Burlington N. Inc.*, 632 F.2d 880 (8th Cir. 1980), cert. denied, 450 U.S. 921 (1981). The Texas appellate court recognized that following *O'Byrne* would require a different result. 804 S.W.2d at 561.

None of Respondent's other arguments address the propriety of granting certiorari to resolve this conflict. Instead, Respondent argues the merits of whether reversible error occurs absent a showing from the face of the jury's verdict that the award was improperly inflated.

It also appears that Respondent has not carefully read Southern Pacific's Petition. For example, Respondent incorrectly claims that Petitioner cites only two cases that conflict with the holding in this case and its supporting authorities. Response at 16. Respondent overlooked relevant post-*Liepelt* cases from the Tenth and Seventh Circuit Courts of Appeals which reversed judgments for denial of non-taxability of award instructions without any showing that the juries improperly inflated the awards.[1] *In re Air Crash Disaster Near Chicago*, 803 F.2d 304, 313 (7th Cir. 1986); *Fulton v. St. Louis-S.F. Ry.*, 675 F.2d 1130, 1134 (10th Cir. 1982). Fourteen state courts have also considered whether the failure to give a non-taxability of award instruction is harmless error absent a showing that the verdict was improperly inflated. See Brief Amicus Curiae 4-8. Four state courts have followed *O'Byrne*, reasoning that no showing of inflation is required, and ten have followed *Flanigan*, holding that error for failure to give the instruction is harmless without a showing that the verdict was inflated.

In view of this manifest conflict that has emerged in the decade since *Liepelt* was decided, this Court should

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[1]Instead of addressing this relevant post-*Liepelt* authority, Respondent relies on seven federal appellate decisions, four of which were decided by the Eighth Circuit Court of Appeals. See Response at 13-16. More significantly, only three of the cases, all from the Eighth Circuit, were decided after *Liepelt*. Respondent's reliance on these cases reaches the merits of whether the lower Texas court's decision was correct and misses the point of whether this Court should grant the Petition to resolve the conflict in authority. Assuming that the four pre-*Liepelt* cases relied on by Respondent from the Second, Third, Eighth and Ninth Circuits are somehow relevant, the conflict in authority is actually more extensive than represented by Petitioner, and the reasons for granting the writ are commensurately stronger.

establish a uniform national standard for determining when, if ever, *Liepelt* error can be deemed harmless.

## III.
## *Petitioner Did Not Fail To Preserve Error Below.*

Respondent claims that Southern Pacific failed to preserve error because "the requested tax instruction was properly refused as it was an incorrect statement of the law and was impossible to apply to the facts of this case." Response at 6–9.

This issue was fully briefed and argued to the Texas intermediate appellate court. The appellate court concluded, however, that: "it was erroneous for the trial court to fail to instruct on the non-taxability of the award." *Southern Pac. Transp. Co. v. Hernandez*, 804 S.W.2d at 561.

The appellate court below did not byase its holding on the asserted deficiencies in the requested instruction. Instead, it reached the broader issue of whether failure to give the instruction was reversible error, and held that the trial court's error was harmless because Hernandez's expert witness had deducted income taxes from his lost earnings calculations and the jury's verdict apparently was not improperly inflated because it was lower than the highest values assigned by the economist. 804 S.W.2d at 562.

The trial court's failure to give a *Liepelt* instruction presents an issue of federal substantive law. *Liepelt*, 444 U.S. at 492–93. Respondent's waiver argument disregards this fact, and, as a result, ignores this Court's authority to

review important federal questions actually decided by state courts.[2]

Where the state court actually rules on a federal question, as it did here, Supreme Court review of the federal question is proper irrespective of whether the issue was preserved below by the appellant. E.g., *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971); *Raley v. Ohio*, 360 U.S. 423, 436 (1959); see also, *Stevens v. Department of Treasury*, 111 S. Ct. 1562, 1567 (1991) (applying rule to issue decided by federal trial court).

Respondent's claim that Southern Pacific's requested instruction was an incorrect statement of the law, even if relevant, is untrue.[3] Respondent raises no challenge to the

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[2]Even under Texas law, the appellate court's decision to reach the harmless error issue reflects a determination by the court that the requested instruction was in substantially correct form sufficient to preserve error. Tex. R. Civ. P. 278.

[3]For the Court's convenience, the full text of Petitioner's requested instruction as reproduced below:

> Under the law, any award made to the Plaintiff in this case is not subject to federal or state income tax. Therefore, in computing the amount of damages which you may find the Plaintiff is entitled to recover for past or future lost earnings, the Plaintiff is entitled to recover only the net, after-tax income. In other words, Plaintiff is entitled to recover only "take-home pay" which you find he has lost in the past, or will lose in the future.

At trial, Respondent raised no objection to the form of Southern Pacific's requested instruction. Instead, Respondent's trial counsel erroneously claimed that state substantive law controlled whether the non-taxability instruction was required, relying incorrectly on *St. Louis*

first sentence of the instruction, which is clearly authorized, if not mandated, by *Liepelt*. The second sentence also is not objectionable because it merely explains the proper procedure for calculating lost earnings, and Respondent's expert witness testified at trial that he followed this method.

Respondent's challenge is based on the alleged confusion caused by the phrase "take-home pay" in the third sentence of the requested instruction. Respondent claims that the requested instruction incorrectly applied the law to the facts of the case because it told the jury not to make any award for fringe benefits, and it encouraged use of a "take-home pay" figure of $20,263.91, which was considerably less than the "after-tax income" figure utilized by Respondent's economist. Response at 1-3; 5-9.

Even assuming that the third sentence of the instruction is ambiguous, there was no evidence presented at trial that made the instruction incorrect as applied to the facts. First, contrary to Respondent's allegation that "[t]he evidence during trial was very clear that Hernandez's net, after-tax income was not the same as his take-home pay," Response at 5 [original emphasis], there was no evidence presented of any after-tax income or take-home pay figure less than Respondent's expert's testimony. In fact, the only mention of the $20,263.91 figure trumpeted by Respondent occurred in a question asked by Petitioner's trial counsel. Statement of Facts (Vol. III) at 61-63. No evidence supporting such a figure was ever introduced. Second, contrary to Respondent's

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*Southwestern Ry. Co. v. Greene*, 552 S.W.2d 880, 884-85 (Tex. Civ. App--Texarkana 1977, no writ), which found no error in denial of a non-taxability instruction as a matter of Texas law. Statement of Facts (Vol. III) at 212-123. This position has since been abandoned by Respondent.

claim that "Hernandez's loss of fringe benefits was included in Dr. Dillman's analysis of Hernandez's loss of earning capacity," Response at 2, the expert's opinion did not include fringe benefits in the lost earnings calculation. In fact, as Respondent recognizes, Dr. Dillman arrived at a net after-tax income figure of approximately $29,000.00[4] by starting with Hernandez's gross earnings of $32,347.00 (as reported to the Internal Revenue Service for tax year 1986) and subtracting income taxes paid of $3,162.00. Fringe benefits of 26% were never factored back into this calculation. Accordingly, even if the proposed instruction is interpreted as excluding fringe benefits, it was not incorrect because fringe benefits were not included in any of the expert's calculations.

## CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted and the opinion of the Texas intermediate appellate court reversed.

Respectfully submitted,

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September 1991

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[4]Respondent states that Dillman used a figure of $28,245.00 as Hernandez's net after-tax income. Response at 2. In fact, at trial Dillman testified the figure was approximately $29,000.00.